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No. 14-144

In The Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Can a state establish a program for private individuals, non-profit organizations, and businesses to design specialty license plates, and then deny access to an eligible non-profit organization because the organization's logo featuring the Confederate battle flag "might be offensive to any member of the public"?

2. Can a state honor the history of the Confederacy and Confederate soldiers through public monuments and state holidays but not allow a non-profit organization to express the same message on specialty license plates?

CORPORATE DISCLOSURE STATEMENT

Texas Division, Sons of Confederate Veterans, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The other Respondents are individuals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	6
ARGUMENT	10
I. THE ONLY "GOVERNMENT SPEECH" ABOUT CONFEDERATE SOLDIERS IS THE MONUMENTS AND LEGISLATION HONORING THEM	10
II. THE SPECIALTY PLATES AT ISSUE HERE ARE PRIVATE SPEECH	12
A. TWO CATEGORIES OF SPECIALTY PLATES: THOSE DESIGNED BY STATE LEGISLATURE, AND THOSE DESIGNED BY PRIVATE PARTIES	13
B. DRIVERS CONTROL WHETHER ANY "SPEAKING" OCCURS	14
C. *SUMMUM* AND OTHER GOVERNMENT SPEECH CASES DO NOT CONTROL THIS CASE	15
D. THE CASES, CITED BY THE DMVB, ABOUT SPEECH-RELATED RESTRICTIONS IN ACCEPTING GOVERNMENT FUNDING ARE ALSO UNAVAILING	22

TABLE OF CONTENTS – Continued

Page

E. THIS COURT RECOGNIZED IN *WOOLEY V. MAYNARD* THAT LICENSE PLATES IMPLICATE THE DRIVERS' PRIVATE SPEECH INTERESTS 25

F. EVERY CIRCUIT COURT OF APPEALS TO ADDRESS THE TYPE OF SPECIALTY PLATE AT ISSUE HERE HAS HELD THAT THE FIRST AMENDMENT APPLIES AND STATE REGULATION MUST BE VIEWPOINT NEUTRAL 27

G. SPECIALTY PLATES DESIGNED BY THE LEGISLATURE MAY BE GOVERNMENT SPEECH, BUT PLATES DESIGNED BY PRIVATE INDIVIDUALS, BUSINESSES, AND NONPROFITS ARE NOT 28

III. THE STATE COMMITTED VIEWPOINT DISCRIMINATION IN REJECTING TEXAS SCV'S PLATE 30

IV. WHETHER SPEECH "MIGHT BE OFFENSIVE TO ANY MEMBER OF THE PUBLIC" IS NOT A CONSTITUTIONALLY VALID STANDARD TO LIMIT SPEECH 36

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

American Civil Liberties Union of N.C. v. Tata, 742 F.3d 563 (4th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3076 (July 11, 2014) (No. 13A1140, 14-35) 28

American Civil Liberties Union of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 434 U.S. 1070 (2006) 28

Arizona Life Coalition, Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) 27

Briggs v. Mississippi, 331 F.3d 499 (5th Cir. 2003) 31

Choose Life Illinois, Inc. v. White, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009) 32, 33, 35, 36

Coleman v. Miller, 912 F. Supp. 522 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997) 31

Denno v. School Bd. of Volusia Cnty., 218 F.3d 1267 (11th Cir. 2000) 31

Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005) ..... *passim*

Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001) 24

Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) 37

Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009) 8, 15, 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972).....30

Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009).....27

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995).....30

Rust v. Sullivan, 500 U.S. 173 (1991).....9, 22, 23, 24

Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991).....37

Snyder v. Phelps, 131 S. Ct. 1207 (2011).....37

Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388 (5th Cir. 2014).....6, 28

Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff, No. A-11-CA-1949-SS, 2013 WL 1562758 (W.D. Tex. Apr. 12, 2013).....5

Van Orden v. Perry, 545 U.S. 677 (2005).....11, 33, 34

Wooley v. Maynard, 430 U.S. 705 (1977).....*passim*

STATUTES

Tex. Gov't Code § 662.003(b)(1).....10, 33

Tex. Transp. Code §§ 504.601, 504.602-504.662, 504.605, 504.607, 504.616, 504.637....1, 13, 14, 21, 35

Tex. Transp. Code § 504.801(c).....5

Tex. Transp. Code § 504.801(e).....19

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Petition for a Writ of Certiorari, No. 14-35, *Berger v. American Civil Liberties Union of N.C.* (July 11, 2014) 29

STATEMENT OF THE CASE

Every year the State of Texas celebrates Confederate Heroes Day, an official state holiday, on January 19th. There are multiple monuments at the Texas Capitol honoring Confederate soldiers. In the floor of the rotunda of the Texas Capitol is a symbol representing the time when Texas was part of the Confederacy. In the Texas Capitol gift shop you can buy replica Confederate currency and miniature Confederate flags. In all this, the State of Texas demonstrates a policy of honoring Texas's history as a part in the Confederacy and of honoring Confederate soldiers. Despite this policy, the Texas Department of Motor Vehicles Board ("DMVB") denied Respondents' application for a specialty plate honoring Confederate veterans, stating that the message was offensive, despite the fact that the State of Texas currently expresses the same message every day. There is no record of any other specialty plate application ever being denied by the DMVB.

Specialty license plates are either (a) created by the legislature by specific legislation[1] or (b) designed by private individuals, non-profits, and businesses who submit their applications to the Texas Department of Motor Vehicles ("DMV") directly or through a

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[1] *See* Tex. Transp. Code §§ 504.601, 504.602-504.662. Some examples of plates made available by statute in Texas include "Animal Friendly," "Keep Texas Beautiful," "Texas Reads," and a Daughters of the Republic of Texas plate that reads "Native Texan." Tex. Transp. Code §§ 504.602, 504.605, 504.616, 504.637.

third-party vendor under contract with the State.[2] People and organizations who want to have a specialty plate create a proposed plate and request approval of the design. A committee of the DMV approves the design, but people who want to display the design on their vehicle choose the plate, pay the extra cost, and normally install them on their vehicle. These people then publish the message when they drive their vehicle in public.

There are more than 350 messages to choose from. The list includes approximately 232 messages chosen by the Texas Legislature and another approximately 174 approved by the Texas Department of Transportation ("TxDOT") or DMVB through application directly to the state agency or through My Plates, the official third-party vendor. The DMV's brochure explains the three ways "to get your specialty license plate on the road."[3]

Some of the specialty plates available to Texas drivers are: Choose Life, Calvary Hill ("One State Under God"), God Bless Texas, Knights of Columbus

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[2] Non-profit organizations can send their application directly to the DMV, but individuals and for-profit businesses must submit their applications through the third-party vendor who helps facilitate and market specialty plates. *See generally* Joint Appendix ("App.") 67.

[3] App. 67. The brochure makes it clear to Texans that the message is theirs. A "Frequently Asked Question" is "Who provides the plate design?" The answer, "You do, though your design is subject to reflectivity, legibility and design standards." *Id.*

("One Nation Under God"), Buffalo Soldiers, Insure Texas Kids, Boy Scouts, Girl Scouts, Texas Masons, Texas Lions Camp, Rotary International, March of Dimes, Be a Blood Donor, College for All Texans, Enduring Freedom, Fight Terrorism, Korea Veterans, Vietnam Veteran, Former Prisoner of War, Woman Veteran, World War II Veterans, Mothers Against Drunk Driving, NASCAR, Operation Iraqi Freedom, Pearl Harbor Survivor, Organ Donor, Rather Be Golfing, Read to Succeed, Stop Child Abuse, Texas It's Like a Whole Other Country, United We Stand, World Wildlife Fund, University of Alabama, University of Arizona, University of Arkansas, University of Georgia, University of Illinois, University of Kansas, University of Kentucky, University of Louisiana, University of Mississippi, University of Missouri, University of Nebraska, University of Oklahoma, University of South Carolina, University of Tennessee, Notre Dame, Oklahoma State University, Re/Max, Dr. Pepper, Mighty Fine Burgers, Master Gardener, Share the Road, YMCA, Young Lawyers Association, Texas State Rifle Association, Texas Trophy Hunters Association, and Animal Friendly.[4]

The Fifth Circuit opinion accurately describes Texas Sons of Confederate Veterans' ("Texas SCV's") application for a specialty license plate and the "tortured procedural history" at TxDOT and the

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[4] See examples included at App. 66. *See also* http://myplates.com, last visited 9/25/14; http://txdmv.gov/motorists/license-plates/specialty-license-plates, last visited 9/25/14.

DMVB.[5] The plate was initially approved by a simple majority vote.[6] Despite the absence of any procedural basis for taking another vote, a second vote was conducted and the plate was rejected.[7] Texas SCV then reapplied with the DMVB, which deadlocked four to four in two votes and then ultimately denied the plate unanimously after an impassioned public hearing.[8]

At the same hearing, the DMVB approved a Buffalo Soldiers plate by a five to three vote, despite the fact that Land Commissioner Jerry Patterson, who sponsored both the Texas SCV and the Buffalo Soldiers plates, told the DMVB at the hearing that he

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[5] Pet. App. 3a-5a, 18a-19a.

[6] The committee at TxDOT in charge of approving specialty plates at the time initially approved the plate by a simple majority vote. App. 52. But the Director of the Vehicle Titles and Registration Division maintained that the plate did not pass and suggested that Texas SCV be notified that its application was rejected. App. 51. In response, another board member emailed the following: "Since it is now documented that we had a quorum and that the plate passed by a simple majority. I don't think we can just declare a no pass. An open records request would expose the vote and we will be shown as biased. I believe we should follow the procedures and let the public decide!" App. 50. Upon the Director's insistence that there be a re-vote based upon the "controversial" nature of the plate, a re-vote was conducted, and the plate was rejected. *See* App. 53. There is no evidence of a valid procedural basis for the committee ignoring the initial majority vote.

[7] *See* App. 53.

[8] App. 45-46, ¶¶ 17, 20; App. 59-60.

had had conversations "with a group of Indians, who were offended by the Buffalo Soldier plate."[9]

In its written rejection of Texas SCV's application for a specialty plate, the DMVB stated:

> The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable.[10]

The Board cited a provision of the Texas Transportation Code which provides, in part, that the Board "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." Tex. Transp. Code § 504.801(c).

Following the denial of its application for a specialty plate, Texas SCV filed the underlying lawsuit challenging the DMVB's decision as unconstitutional under the First and Fourteenth Amendments to the Constitution.

The district court granted the DMVB's motion for summary judgment and denied Texas SCV's motion for summary judgment. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, No. A-11-CA-1049-SS,

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[9] USCA5 377; USCA5 451.

[10] App. 64.

2013 WL 1562758 (W.D. Tex. Apr. 12, 2013). The court held that the specialty plates implicated private speech concerns but found no viewpoint discrimination. *Id.* The Fifth Circuit reversed and remanded, holding that the specialty plates were private speech and the State engaged in viewpoint discrimination in denying Texas SCV's specialty plate. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014).

SUMMARY OF THE ARGUMENT

The Texas government honors Confederate veterans every year on January 19th, which is an official state holiday known as Confederate Heroes Day. Texas also honors Confederate veterans with memorials on the grounds of the Texas Capitol, and sells replica Confederate currency and depictions of the Confederate flag at the Capitol gift shop and online. The State apparently does not believe that the "message" of the Confederate flag is offensive to the public, or, if it is offensive, the State certainly does not shy away from its expression because of such offense.

Yet, when the Texas SCV sought to express the same message as the State, the DMVB rejected their application on the basis that it "might be offensive to any member of the public." The record is silent as to any other organization whose application for a specialty plate has ever been denied.

The messages on some plates are designed by the Texas Legislature. There are more than two hundred specialty plates available that were proposed in bills by a representative of Texas government, reviewed and passed by vote in both the Texas House and Senate, and signed by the Governor of Texas. In contrast, at issue in this case, are the other nearly two hundred plates that are designed by individuals, non-profits, or for-profit businesses who apply to a state agency (or official third-party vendor) to create a plate. For these plates, the design, from beginning to end, is in the hands of non-state actors. Individuals, non-profits, or businesses design the message for a plate, the DMVB approves or rejects the plate – there is no evidence in the record of the DMVB ever rejecting any other plate – then a driver chooses to convey the message expressed, purchases the plate, affixes it to his or her car, and drives onto the public roadway. No speech would occur but for a private individual, non-profit, or business designing the message and the driver attaching his or her chosen plate to the bumper and exiting his or her driveway.

This Court held in *Wooley v. Maynard,* 430 U.S. 705 (1977) that messages on license plates, even "standard issue" messages like state mottos, implicate the First Amendment rights of the driver. In other words, messages on license plates are private speech. Every circuit court of appeals to address the type of specialty plate at issue here (those designed by non-profit organizations) have held that the specialty plates implicate private speech and the First

Amendment applies. Nothing prohibits the State from speaking in the same forum as individuals, non-profits, and businesses, and when the State speaks it does so by passing specific legislation. Perhaps it may be considered "government speech" when the State passes legislation creating a specific specialty plate, but that is not at issue in this case.

The government speech cases relied on by the DMVB are not dispositive and are easily distinguishable. While public monuments have long been associated with speech of the government, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009), messages on license plates are readily associated with the owner of the vehicle. *See Wooley*, 430 U.S. at 717, n. 15. Public monuments are permanent, while a message on a passing vehicle is fleeting, and specialty plates must be renewed annually. In the case of monuments, the government has final approval authority on whether the speech will occur; in the case of specialty plates, no speech occurs until and unless a driver purchases a specialty plate and drives onto a public roadway, knowing that he or she will be identified with the message expressed. Finally, the specialty plate forum is not like a public park where "accommodating a large number of public speakers [would] defeat the essential function of the land or the program." *Summum*, 555 U.S. at 478.

Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005), is also distinguishable because the beef promotion message in that case was "established by the Federal Government." In contrast, for the specialty

plates at issue here, the message is designed only by the individuals, non-profits, or businesses who apply for plates and is only carried out by drivers who choose to put that message on their cars and thereby choose to be associated with the message. In contrast to *Johanns* and *Rust v. Sullivan*, 500 U.S. 173 (1991), there is no singular "programmatic message" of the Texas specialty license plate program that would constitutionally prohibit the Texas SCV plate. If there is any "programmatic message" at all, it is that Texans should freely express themselves on specialty plates and thereby raise money for the sponsoring state agency, the general highway fund, and/or the non-profit organization.

Because specialty plates designed by private parties and published by private parties are private speech, the First Amendment applies and restrictions on speech must be viewpoint neutral. The DMVB denied Texas SCV's application for a specialty plate for one reason – because the plate "might be offensive to any member of the public." This "potential offensiveness" standard is not a constitutionally valid standard and is a recipe for viewpoint discrimination. When the DMVB rejected Texas SCV's plate, it entered into the debate over the flag's meaning and endorsed a particular viewpoint. The DMVB gave its imprimatur to the viewpoint that the Confederate battle flag is a symbol of racism, and discriminated against those who view the flag as a historic symbol of the Confederate soldier's sacrifice, independence, and Southern heritage. The DMVB's decision is truly

ironic considering the State of Texas expresses the same viewpoint as Texas SCV every day of the year through its legislation and monuments honoring Confederate soldiers.

ARGUMENT

I.

THE ONLY "GOVERNMENT SPEECH" ABOUT CONFEDERATE SOLDIERS IS THE MONUMENTS AND LEGISLATION HONORING THEM.

Although the State only manufactures the plates and does not create the content or publish the content, the DMVB argues that its approval of the message makes the message government speech and not the speech of the organization that proposed the message or the person who purchases and displays the license plates on his or her vehicle. The irony is that the State endorses Texas SCV's message every day and has an apparent state policy of honoring Confederate veterans and commemorating Texas's role in the Confederacy.

January 19th is an official Texas holiday known as Confederate Heroes Day.[11] Texas used to celebrate both Robert E. Lee's birthday and Jefferson Davis's

[11] Tex. Gov't Code § 662.003(b)(1) (designating January 19th "'Confederate Heroes Day,' in honor of Jefferson Davis, Robert E. Lee, and other Confederate heroes.").

birthday, but the holidays were combined into one "Confederate Heroes Day" in 1973 by legislation.[12] On this day, it is not unusual to find people dressed in Confederate period attire near the steps of the Texas Capitol.[13] In addition, there are three permanent monuments to Confederate soldiers on the Capitol grounds: the Confederate Soldiers monument; the Terry's Texas Rangers monument; and the Hood's Brigade monument. *Van Orden v. Perry*, 545 U.S. 677, 706 Appendix B (2005) (BREYER, J., concurring) (photocopy of the Texas Capitol Monument Guide).[14] Inside the Capitol building, on the floor under the rotunda, is an emblem symbolizing Texas's role in the Confederacy.[15] At the visitors' gift shop in the Capitol, visitors can purchase miniature Confederate flags, posters with the same Confederate flag, and even replica Confederate currency.[16] Near the Capitol is the John H. Reagan State Office Building. *Van Orden*, 545 U.S. at 706 Appendix B (2005) (BREYER, J.,

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[12] *See* http://www.tsl.texas.gov/ref/abouttx/holidays.html (last visited 1/23/2015). Robert E. Lee's birthday is January 19th.

[13] *See* http://www.myfoxaustin.com/story/24511951/robert-e-lee-remembered-at-capitol (last visited 1/23/2015).

[14] *See also* http://www.tspb.state.tx.us/SPB/Gallery/MonuList/MonuList.htm (last visited 1/27/2015). Hood's Texas Brigade was an infantry brigade that fought in the battle of Gettysburg. Terry's Texas Rangers was a volunteer cavalry unit from Houston that fought in the Civil War.

[15] *See generally* http://www.tspb.state.tx.us/SPB/Gallery/SigSpace/rot_sm.htm (last visited 1/23/2015).

[16] *See* http://www.texascapitolgiftshop.com/ (last visited 1/23/2015).

concurring). John H. Reagan served as the Postmaster General for the Confederate States of America.[17]

When the State has spoken at all about Confederate soldiers or the Confederacy, it has expressed the same message as Texas SCV – it has honored the Confederate soldiers and commemorated Texas's role in the Confederacy. In this context, the DMVB's argument that the State can reject the Texas SCV plate because Texas SCV's message is offensive is ludicrous.

II.

THE SPECIALTY PLATES AT ISSUE HERE ARE PRIVATE SPEECH.

The specialty plates at issue here are either private speech or government speech. This is a matter of first impression in this Court. If they are private speech, the DMVB cannot discriminate based on viewpoint, and offensiveness is an impermissible standard. If they are government speech, the government is free to say whatever it wants, subject to the Establishment Clause, but is not constrained by the Free Speech Clause.

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[17] *See* http://en.wikipedia.org/wiki/John_Henninger_Reagan (last visited 1/23/2015).

A. TWO CATEGORIES OF SPECIALTY PLATES: THOSE DESIGNED BY STATE LEGISLATURE, AND THOSE DESIGNED BY PRIVATE PARTIES.

There are two categories of specialty plate programs.[18] First, there are specialty plates created by specific individual enabling legislation. Each of these plates was proposed in a bill by a representative of the Texas government, reviewed and passed by both the Texas House and Senate, and signed by the Governor of Texas. For example, the 78th Texas Legislature passed a bill requiring the DMV to "issue specialty license plates including the words 'Read to Succeed.'" Tex. Transp. Code § 504.607. In this first category, the message is designed by the government.[19]

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[18] Specialty plates allow Texans to express themselves in the areas of their license plates surrounding the sequence of alpha-numeric characters. Vanity plates, which were made available before specialty plates, allow Texans to choose specific alpha-numeric characters to express themselves instead of merely being assigned a random combination of characters. For an extra fee, drivers can choose to purchase a specialty plate and also personalize the alpha-numeric characters. *See generally* http://myplates.com (last visited 1/28/2015).

[19] Other specialty plates designed by the Texas Legislature include Keep Texas Beautiful, State of the Arts, Animal Friendly, Special Olympics Texas, Texas YMCA, Go Texan, Share the Road, Daughters of the Republic of Texas "Native Texan," Knights of Columbus, Texas Music, Smile Texas Style, Fight Terrorism, God Bless Texas, God Bless America, March of Dimes, Master Gardener, Boy Scouts of America, Insure Texas

(Continued on following page)

Second, there are specialty plates designed by private citizens, non-profit organizations, and businesses. This case involves specialty plates in this second category. Private individuals and organizations design a message and apply to a state agency, such as the DMV, or to a private vendor authorized by the state, to have their own designs published on specialty license plates.[20] In this case, there is no evidence of the DMVB rejecting any application for a specialty plate except for the Texas SCV plate.

B. DRIVERS CONTROL WHETHER ANY "SPEAKING" OCCURS.

Regardless how the message on a specialty plate is authored, no speech occurs until drivers choose messages they endorse, purchase the plates, affix them to the bumpers of their cars, and exit their driveways onto a public road. The act of speaking is thus entirely controlled by the driver. If no driver purchases a "Read to Succeed" plate, that message is

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Kids, and Choose Life. *See generally* Tex. Transp. Code § 504.602 *et seq*.

[20] Some specialty plates designed by citizens, non-profit organizations, and businesses include Calvary Hill "One State Under God," American Quarter Horse Association, Buffalo Soldiers, LSU Alumni, Fort Worth Zoo, Freebirds, Ignite Steam Energy, Dr. Pepper, Mighty Fine Burgers, NASCAR, National Wild Turkey Federation, Rotary International, Texas Masons, Texas Realtors, RE/MAX, Rather Be Golfing, and World Wildlife Fund. *See generally* http://myplates.com (last visited 1/23/2015).

never expressed in the license plate forum. The message is either authored by the State itself (e.g., "Read to Succeed") or by a private individual or organization (e.g., the Calvary Hill plate with "One State Under God"), then it is printed by the State onto a license plate, and ultimately published – if it is ever published – by the driver who wants to express that message. The driver has absolute control over whether to express any message through a specialty plate and, if so, which message to express. Without the driver's expressive conduct, no speech would occur.

In the case of plates designed by individuals, non-profit organizations, and businesses, private citizens or organizations both design the message and engage in the actual dissemination of the message. The government, in etching the message on a license plate, is only a printer; the private parties conceive of and publish the messages expressed.[21]

C. *SUMMUM* AND OTHER GOVERNMENT SPEECH CASES DO NOT CONTROL THIS CASE.

The government speech doctrine is newly minted, and its rough contours have been described in only a

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[21] Further illustrating that the driver is the publisher of any message on a specialty plate, the State is constitutionally forbidden to compel drivers to express a message on their license plate that they disagree with. *Wooley v. Maynard*, 430 U.S. 705 (1977). Drivers have ultimate control over publishing a message via license plate.

few cases. *See generally Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). These cases do not dictate a finding here that specialty plates designed by non-profit organizations, businesses, or private individuals are government speech.

In *Summum* the Court held that placing donated permanent monuments in a public park was government speech, and Pleasant Grove City was not constitutionally required to accept a permanent monument proposed by Summum, a religious organization.[22] 555

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[22] Four of the justices in *Summum* expressed concern or caution about overextending the newly minted "government speech doctrine." *See id.* at 481 (STEVENS, J., concurring) ("To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. The Court's opinion in this case signals no expansion of that doctrine." (Citation omitted.)); *Id.* at 484 (BREYER, J., concurring) ("[T]he 'government speech' doctrine is a rule of thumb, not a rigid category. . . [C]ourts must apply categories such as 'government speech' . . with an eye toward their purposes – lest we turn 'free speech' doctrine into a jurisprudence of labels. . . Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."); *Id.* at 485-87 (SOUTER, J., concurring) ("Because the government speech doctrine . . . is 'recently minted,' it would do well for us to go slow in setting its bounds. . . . To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.").

U.S. 460 (2009). Although the Court did not articulate a bright line test to determine in all instances whether speech is private or government speech, it considered the following in its analysis of whether privately donated monuments were private or government speech: (a) whether the speech is permanent or transitory; (b) whether the speech is "closely identified in the public mind with the government," or, in other words, whether the speech is "meant to convey and [has] the effect of conveying a government message"; and (c) whether the government "effectively control[s]" the message by exercising "final approval authority." *Id.* at 464, 472, 473. Speech that is permanent, as opposed to transitory, has a message that is closely identified with the government, and over which the government has final approval authority may be government speech. Further, the Court considered whether "accommodating a large number of public speakers [would] defeat the essential function of the land or the program." *Id.* at 478. In the case of a public park, the answer is clear; accepting all privately donated monuments could result in a park cluttered with monuments and unusable for its essential function, and thus monuments in a public park are properly considered government speech.

Summum is not dispositive of this case. In contrast to a permanent monument in a public park, a message on a specialty plate is transitory. The message is only expressed to passersby on public roadways, and the plate itself has to be renewed annually. While "[g]overnments have long used monuments to

speak to the public," *id.* at 470, messages on specialty license plates are closely identified not with the government, but with the driver of the car. In fact, the entire success of the specialty plate (and vanity plate) program depends on the fact that the messages expressed are identified with the driver, whether the plate is a vanity plate stating "BARFLY" or a specialty plate indicating the driver supports the Buffalo Soldiers. The message on a license plate is "closely identified in the public mind" with the driver even when every license plate bears the same message. *Id.* at 472; *Wooley v. Maynard,* 430 U.S. 705, 717 n. 15 (1977).

While the DMVB argues that the State "effectively controls" the message by exercising "final approval authority" over proposed specialty plates, there is no evidence in the record that the DMVB has ever exercised such control.[23] There is no evidence that any proposed specialty plate other than Texas SCV's has been rejected. Further, although approval by the DMVB is a nominal step required to get a specialty plate on the road, it is ultimately the individual driver who exercises final approval authority. If no driver wants to express the message on the specialty plate, no speech ever occurs.

Finally, "accommodating a large number of public speakers" does not "defeat the essential function of

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[23] Of course the DMVB has no control of or say in hundreds of license plates the content of which are mandated by Texas statute.

the [specialty plate] program." There are already more than 350 specialty plates available to Texas drivers, and the number of different specialty plates that could be on the road is only limited by the number of vehicles registered in Texas. The "essential function" of the specialty plate program is to encourage as many drivers as possible to purchase the more expensive specialty plates and thereby raise money for the sponsoring state agency, the general highway fund, and/or the non-profit organization.[24]

Other "government speech" cases are also not dispositive of this case. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the Court held that the promotional campaigns implemented by the Secretary of Agriculture pursuant to the Beef Promotion and Research Act of 1985 were government

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[24] The DMVB now takes the position that the type of plate sought by the Texas SCV is not a revenue-generating venture for the State. Pet. Br. at 22. This is a new argument. The DMVB took the exact opposite position in the district court, stating in its motion to dismiss Texas SCV's complaint, "With respect to the specialty plate type at issue here – i.e., a plate issued as a result of an application by a non-profit entity made directly to the Board – the majority of the revenue generated by the plate fee ($22 per plate) is either deposited in the state's general revenue fund for the benefit of the sponsoring state agency or, if no agency has sponsored the plate, the revenue is deposited in the state highway fund. *See* Tex. Transp. Code § 504.801(e)." Def. Mot. to Dismiss Pl. First Am. Compl., USCA5 157. *See also* Specialty License Plate Revenue, available online at http://www.txdmv.gov/reports-and-data/doc_download/673-specialty-license-plate-revenue (last visited Jan. 26, 2015) (spreadsheet showing $171 million total revenue for all plates from 1994-2012).

speech. Although the campaigns were designed by a board in which only half of the members were appointed by the Secretary, "the message set out in the beef promotions is from beginning to end the message established by the Federal Government." *Id.* at 560.

> Congress has directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." 7 U.S.C. §§ 2901(b), 2902(13). Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain, *see, e.g.*, § 2904(4)(B)(i) (campaigns "shall take into account" different types of beef products), and what they shall not, *see, e.g.*, 7 CFR § 1260.169(d) (2004) (campaigns shall not, without prior approval, refer "to a brand or trade name of any beef product"). Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well). All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and

> participate in the open meetings at which proposals are developed.

Id. at 561 (citations omitted).

In contrast, the specialty plates at issue here are "from beginning to end" messages that are (1) designed by private individuals, non-profits, or businesses and (2) published by drivers who choose to convey the message. The Texas Transportation Code does not "specify, in general terms" what messages these types of specialty plates will contain. There is no "overarching message" set out by the Texas Legislature that citizens are trying to convey. Instead, the messages expressed are the citizens' own messages.[25] There is no evidence in the record of the DMVB ever rejecting or rewriting a proposed specialty plate, and certainly the DMVB does not "attend and participate in the meetings" at which individuals, non-profits, and businesses develop proposed messages.

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[25] Certainly the State can also express itself in the specialty license plate forum. The State has designed many license plates, specifying the words and sometimes images that are to be included. *See* Tex. Transp. Code § 504.602 *et seq.* But specialty plates designed by the State legislature are not at issue here. Further, even those types of plates are not published, and no "speaking" is done, until a Texas driver endorses that message, purchases the plate, and takes their "mobile billboard" on a public road. *Johanns*, 544 U.S. at 557 (citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

D. THE CASES, CITED BY THE DMVB, ABOUT SPEECH-RELATED RESTRICTIONS IN ACCEPTING GOVERNMENT FUNDING ARE ALSO UNAVAILING.

The DMVB argues that, under *Rust v. Sullivan*, 500 U.S. 173 (1991), the specialty license plate system is a "government program" and the government can therefore control what content is or is not expressed. *Rust* is a compelled speech or subsidized speech case and is not analogous to this case. More importantly, there is no "programmatic message" that prevents the Texas SCV plate from being approved.[26]

At issue in *Rust*, in part, were restrictions on recipients of family planning funding, issued pursuant to Title X of the Public Health Service Act of 1970, which prevented them from encouraging, promoting, advocating, or counseling the use of abortion as a method of family planning. *Rust* argued that the regulations violated the First Amendment by prohibiting all discussion about abortion between health care providers and their patients. The Court held that the restrictions were constitutional because "when [the Government] chooses to fund a program dedicated to advance certain permissible goals the program in advancing those goals necessarily

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[26] To the extent not issuing a plate that "might be offensive to any member of the public" could possibly be considered a "programmatic message," it is unconstitutional. *See infra*, Section IV.

discourages alternative goals." *Id.* at 194. The restrictions in Title X funding did not result in "a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-95.

Rust is unavailing to the DMVB because there is no evidence that a plate about the Confederacy or Confederate soldiers, or any plate proposed by the Texas SCV, was ever "specifically excluded from the scope of the [specialty plate] project" by statute or regulation. The DMVB cannot cite any statute, legislative history, or anything in the record limiting the scope of the specialty plate program in a way that would exclude Texas SCV's plate.[27] Unlike Title X, which specifically stated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning," there is nothing in the specialty plate statute that would prevent Texas SCV from getting a plate. The specialty plate program is designed to expand speech and the State's coffers by allowing individuals, non-profits, and businesses to design specialty plates. Approving Texas SCV's plate would further the purpose of the program, not run counter to it.

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[27] In fact, the only statute or unqualified State conduct regarding the Confederate veterans is the Confederate Heroes Day statute and the various public monuments specifically honoring Confederate veterans.

Further, the DMVB, in rejecting Texas SCV's plate, stated it was rejected because it "might be offensive to any member of the public" and made absolutely no mention of any programmatic message.

In this way, this case is clearly more akin to *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) then *Rust*. In *Legal Services Corporation* the Court held that a restriction prohibiting local recipients of Legal Services Corporation funds from challenging welfare laws was unconstitutional. *Id.* at 549. The Court noted that, unlike the program in *Rust*, "There can be little doubt that the LSC Act funds constitutionally protected expression; and in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Id.* at 548. Similarly, the specialty plate program is designed to promote the free expression of the individuals, non-profits, or businesses that design plates, and the drivers who become mobile billboards for the message. There is no programmatic message in the specialty plate statute or regulations that would constitutionally prevent Texas SCV from getting a plate.

The DMVB strangely declares that speech "that appears on" a license plate is within the scope of the "program" and speech that "appears elsewhere on a vehicle is outside the program." Pet. Br. at 18-19. Perhaps that is true, but it means nothing. Even if the *Rust* analysis were relevant to deciding this issue,

Texas SCV's proposed plate is clearly within the "scope of the program," as the DMVB defines it, because the program involves speech on a license plate and Texas SCV is seeking to have speech on a license plate. The key distinguishing fact – ignored by the DMVB – is that there is no programmatic message that would constitutionally exclude Texas SCV from getting a specialty plate.

E. THIS COURT RECOGNIZED IN *WOOLEY V. MAYNARD* THAT LICENSE PLATES IMPLICATE THE DRIVERS' PRIVATE SPEECH INTERESTS.

This Court has never addressed whether specialty plates are "government speech" or "private speech," in those terms, but has affirmatively answered the question whether messages on a license plate are the speech of the driver. In *Wooley v. Maynard*, 430 U.S. 705 (1977), a majority of the Court recognized that messages on license plates are "readily associated" with the driver and implicate the driver's free speech rights.[28] The issue was "whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because the motto is repugnant to their moral and religious beliefs." *Id.* at 706-07. The Maynards were

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[28] *See also Johanns*, 544 U.S. at 579, n. 9 (SOUTER, J., dissenting) (describing the drivers in *Wooley v. Maynard* as the "speakers" forced to communicate the state motto).

Jehovah's Witnesses who did not want to express the state motto. In holding that it was unconstitutional for the State to "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," the Court implicitly recognized that messages on license plates are the driver's speech. *Id.* at 713. The Court did so even though "Live Free or Die" was a message designed by New Hampshire and published on every license plate registered in the state. Even though a fully informed observer would arguably understand that the "Live Free or Die" motto was state motto and did not necessarily reflect the views of the Maynards, this Court was careful to protect the rights of drivers to speak – or refuse to speak – through messages on their license plates. The Court noted that, unlike a motto incorporated into a state seal or other symbol that may be required on official documents, the purpose of a message on a license plate is "to advertise the message it bears." *Id.* at 715, n. 11. Indeed, a license plate is akin to a "mobile billboard," and a driver is a "courier for such message" expressed on the license plate. *Id.* at 715, 717. Similarly, the Court noted, messages on license plates are different from messages on coins and currency (like "In God We Trust"), because "currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator." *Id.* at 717, n. 15. The Court found that the State had no countervailing interest sufficiently compelling to justify requiring

the Maynards to display the state motto on their license plates. *Id.* at 716.

If messages on license plates were merely government speech, the Free Speech Clause would not have been implicated in *Wooley*, and the case would have come out differently: the Court would have endorsed the criminal sanctioning of the Maynards for covering up the state motto.

F. EVERY CIRCUIT COURT OF APPEALS TO ADDRESS THE TYPE OF SPECIALTY PLATE AT ISSUE HERE HAS HELD THAT THE FIRST AMENDMENT APPLIES AND STATE REGULATION MUST BE VIEWPOINT NEUTRAL.

Every circuit to address the type of specialty plate program at issue here – specialty plates designed by individuals, non-profit organizations, and/or for-profit businesses pursuant to a program for private parties to apply for plates, as opposed to specialty plates designed by state legislatures through individual legislation – has held that specialty plates implicate private speech concerns and that government regulation of those plates must comply with the First Amendment. *See Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) (Arizona's "special organization license plate program" was primarily private speech and restrictions had to be viewpoint neutral); *Roach v. Stouffer*, 560 F.3d 860

(8th Cir. 2009) (Missouri's organizational license plate program held to be private speech of the organization and the vehicle owner); *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014). Including the Fifth Circuit, there have now been three circuit courts of appeals to address the type of specialty plates at issue here, and each one of them has concluded that the specialty plates at issue in this type of program implicate private speech and the state's regulation of them must be viewpoint neutral.

G. SPECIALTY PLATES DESIGNED BY THE LEGISLATURE MAY BE GOVERNMENT SPEECH, BUT PLATES DESIGNED BY PRIVATE INDIVIDUALS, BUSINESSES, AND NON-PROFITS ARE NOT.

With regard to specialty plates designed by the state legislatures, the Sixth Circuit held that a "Choose Life" plate created by legislative enactment was government speech. *American Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006), *cert. denied*, 434 U.S. 1070 (2006) ("Choose Life" plate was government speech because "the Act determines the overarching message and Tennessee approves every word on such plates."). The Fourth Circuit reached the opposite conclusion on similar facts in 2014, holding that North Carolina *did* violate the First Amendment in creating a "Choose Life" plate while not offering a pro-choice plate. *American Civil Liberties Union of N.C. v. Tata*, 742 F.3d 563,

576 (4th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3076 (July 11, 2014) (No. 13A1140, 14-35) ("Because the specialty plate speech at issue implicates private speech rights and is not pure government speech, North Carolina's authorizing a 'Choose Life' plate while refusing to authorize a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment.").[29]

It is certainly possible for the State to join private parties and express itself in the specialty license plate forum. Indeed, the Texas Legislature has passed legislation authorizing many specific specialty license plates.[30] These specialty plates certainly have more elements of government speech than plates designed by private parties, because the Texas Legislature passed legislation creating the message on the plates. Still, the driver has ultimate control over whether the message is published and any speech actually occurs.

While these cases present interesting legal issues, they are not applicable to the present case, which involves specialty plates designed by private parties, not state legislatures. All cases to consider specialty plates designed by private parties have found them to implicate private speech concerns.

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[29] *See* Petition for a Writ of Certiorari, No. 14-35, *Berger v. American Civil Liberties Union of N.C.* (July 11, 2014).

[30] *See* footnote 19, *supra*.

III.

THE STATE COMMITTED VIEWPOINT DISCRIMINATION IN REJECTING TEXAS SCV'S PLATE.

When the government opens up a forum for private citizens to speak, such as the State did when it created the specialty plate program at issue, the government cannot distinguish among potential speakers based on the speakers' viewpoints. *See, e.g., Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum . nor may it discriminate against speech on the basis of its viewpoint. ") (internal quotations and citations omitted).

It is undeniable that the Confederate battle flag is a symbol that evokes passionate viewpoints, both in favor and in opposition. As a Georgia district court observed:

> [T]here is no consensus today, almost forty years after the [adoption of a state flag containing the Confederate battle flag] by the [Georgia] General Assembly, on its meaning.

> There are citizens of all races who view the flag as a symbolic acknowledgement of pride in Southern heritage and ideals of independence. Likewise, there are citizens of all races who perceive the flag as embodying principles of discrimination, segregation, white supremacy, and rebellion.

Coleman v. Miller, 912 F. Supp. 522, 530 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997); *see also Briggs v. Mississippi*, 331 F.3d 499, 506 (5th Cir. 2003) ("It is common knowledge that public reaction to and the debate over the flying of the Confederate battle flag, or its being a part of a state flag, has been virtually exclusively in relation to its symbolism of the Confederacy and the valor of its troops and whether or to what extent this symbolism extols or excuses slavery, racial oppression or resistance to racial equality.").

The discussion that arises about the Confederate flag is exactly the sort of robust debate that is protected by the First Amendment, and the State may not discriminate against speakers in that debate on the basis of their viewpoint. *See Denno v. School Bd. of Volusia Cnty.*, 218 F.3d 1267, 1285 (11th Cir. 2000) (FORRESTER, J., concurring and dissenting in part) ("The Confederate battle flag itself is a catalyst for the discussion of varying viewpoints on history, politics and societal issues. Discourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect."). That there is controversy

surrounding the Confederate flag shows that it is a symbol that should be a topic for open debate, without the government censoring one side or the other.

When the DMVB rejected Texas SCV's plate, it entered into the debate over the flag's meaning and endorsed a particular viewpoint. The DMVB gave its imprimatur to the viewpoint that the Confederate battle flag is a symbol of racism, and discriminated against those who view the flag as a historic symbol of the soldier's sacrifice, independence, and Southern heritage. The DMVB's rejection of the Texas SCV plate constitutes impermissible viewpoint discrimination prohibited by the First Amendment.

The DMVB argues that the Seventh Circuit's holding in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009), means that the State did not commit viewpoint discrimination because it "has not issued any specialty license plate that disparages the confederate battle flag or the views espoused by the Sons of Confederate Veterans." Pet. Br. at 46. Under the Seventh Circuit's rationale, Petitioners argue, there is no viewpoint discrimination under the present facts because Texas has not issued any plates pro- or anti- Confederacy. Pet. Br. at 51-52.

In *Choose Life Illinois*, a pro-life advocacy group sought a specialty plate, which in Illinois required a specific legislative enactment. The General Assembly failed to pass enabling legislation to create a "Choose Life" plate, and the advocacy group sued. The Seventh Circuit held that specialty license

plates implicated private speech but that the specialty plate forum was only a non-public forum. The court then concluded that Illinois had decided to exclude the entire subject of abortion, and thus the denial of the plate was content-based but viewpoint neutral. "It is undisputed that Illinois has excluded the *entire subject* of abortion from its specialty-plate program," the court held. *Id.* at 855 (emphasis original).

But this logic is not applicable to the Texas SCV plate.

First, there is no evidence that the State has purposefully eschewed issues related to the Confederacy or Confederate soldiers. In fact, the State's position is demonstrably the same as that expressed by Texas SCV. Texas SCV seeks to honor the Confederate soldiers and preserve the history of the Confederacy. As stated previously, the State does the same thing every day. January 19th is an official state holiday known as Confederate Heroes Day.[31] On the Texas Capitol grounds there are monuments honoring Confederate soldiers, including the Hood's Texas Brigade, Terry's Texas Rangers, and Confederate Soldiers monuments. *Van Orden v. Perry*, 545 U.S. 677, 706 Appendix B (2005) (BREYER, J., concurring) (photocopy of the Texas Capitol Monument Guide).[32]

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[31] Tex. Gov't Code § 662.003(b)(1) (designating January 19th "'Confederate Heroes Day,' in honor of Jefferson Davis, Robert E. Lee, and other Confederate heroes.").

[32] *See also*, http://www.tspb.state.tx.us/SPB/Gallery/MonuList/MonuList.htm (last visited 1/27/2015).

On the floor of the Capitol is an emblem of the Confederacy.[33] In the visitor's gift shop at the Capitol (or online), one can purchase posters and books commemorating the six flags that have flown over Texas (including the Confederate flag at issue here), replica Confederate currency, and various reproductions of the Confederate flag itself.[34] Near the Capitol is the John H. Reagan State Office Building. *Van Orden*, 545 U.S. at 706 Appendix B. Its namesake was Postmaster General of the Confederate States of America.[35] This is not a case where the State has a policy of avoiding the topic of the Confederacy or the Confederate flag. In fact, whenever the State has spoken about these topics, it has expressed the same message that Texas SCV seeks to express, one of commemorating the past and honoring the sacrifices of Confederate soldiers.[36]

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[33] *See generally* http://www.tspb.state.tx.us/SPB/Gallery/SigSpace/rot_sm.htm (last visited 1/23/2015).

[34] *See* http://www.texascapitolgiftshop.com/ (last visited 1/23/2015).

[35] See http://en.wikipedia.org/wiki/John_Henninger_Reagan (last visited 1/23/2015).

[36] Further, the State already has a wide variety of plates honoring veterans and veterans' descendants. There are specialty plates honoring the American Legion, Air Force Association, Air Force Cross recipients, Air Medal recipients, Armed Forces Reserve, Army Distinguished Service Cross recipients, Bronze Star medal recipients, Buffalo Soldiers, Civil Air Patrol, Coast Guard Auxiliary, Defense Superior Service Medal recipients, Desert Storm veterans, Disabled Veterans, Disabled Veteran – Surviving Spouse, Enduring Freedom veterans, Gold Star Family (honoring family members of soldiers who died while

(Continued on following page)

Second, the DMVB expressly rejected Texas SCV's plate because it was deemed "offensive," not because Texas was avoiding an issue raised by the Texas SCV plate. The DMVB's written denial says nothing about the State excluding an entire subject related to the Texas SCV plate (which would have been incorrect in any event). Tellingly, nowhere in this record is there any evidence that the State has purposefully eschewed the entire "issue" raised by the Texas SCV plate, however that issue may be defined.

Third, the specialty plate program in Illinois required a separate legislative enactment for every specialty plate. *Choose Life Ill.*, 547 F.3d at 855. It did not involve the same specialty plate program at issue here, where individuals, non-profits, and businesses could design plates and apply to the DMV. Because the legislature in Illinois had to authorize each plate, there was an element of legislative discretion and control that is absent from the private parties' specialty plate program in Texas.

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serving), Gold Star Spouse, Honorably Discharged, Korea Veterans, Navy Cross, Operation Enduring Freedom Afghanistan, Operation Iraqi Freedom, Pearl Harbor Survivor, Prisoner of War, Purple Heart Recipient, Texas National Guard, Texas Navy, U.S. Air Force, U.S. Army, U.S. Coast Guard, U.S. Marine Corps, U.S. Navy, U.S. Paratrooper, Vietnam Veteran, Woman Veteran, World War II Veterans, and others. *See generally* http://myplates.com, last visited 9/25/14; http://txdmv.gov/motorists/license-plates/specialty-license-plates (last visited 9/25/14); Tex. Transp. Code § 504.602 *et seq*.

Finally, the Seventh Circuit itself noted in its opinion that if the case involved the Confederate flag it would have come out differently. The court noted, "[E]xcluding the Confederate flag from a specialty-plate design [is a] fairly obvious instance[] of discrimination on account of viewpoint." *Id.* at 865. The Seventh Circuit recognized that the Confederate flag itself is a "viewpoint-specific symbol" and banning it is inherently viewpoint discrimination. *Id.* Thus, even if this case were decided by the Seventh Circuit, that Circuit would have reached the same conclusion as the Fifth Circuit.

IV.

WHETHER SPEECH "MIGHT BE OFFENSIVE TO ANY MEMBER OF THE PUBLIC" IS NOT A CONSTITUTIONALLY VALID STANDARD TO LIMIT SPEECH.

The DMVB denied Texas SCV's specialty plate application because it determined "that many members of the general public find the design offensive." App. 64. It has long been an established rule of First Amendment law that speech cannot be curtailed simply because it may be offensive to some.

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [T]he Constitution does not permit the government to decide which types of otherwise protected

> speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.

Snyder v. Phelps, 131 S. Ct. 1207, 1219-20 (2011) (alterations in original, internal quotations and citations omitted). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (quotations omitted). "[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder*, 131 S. Ct. at 1219 (internal quotation omitted).

Whether something "might be offensive to any member of the public" "is so nebulous and malleable [that it could mean] anything presently politically expedient." *See Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) (alteration in original, quotation omitted), *cert. denied*, 535 U.S. 986 (2002) (rejecting "contrary to public policy" and "inflammatory" standards under personalized license plate regulations as unconstitutional and ordering Missouri to reissue personalized plate to applicant) (internal quotation omitted). The history of this case proves that the "might be offensive to any member of the public"

standard provides no objective guidance to speakers, gatekeepers, and courts to evaluate speech. Four different votes were taken by TxDOT and the DMVB, with widely different results.[37] The proposed speech had not changed at all during this process, proving the "offensiveness" standard is completely subjective.

There is almost no speech that does not offend someone. Non-Christians or atheists could be offended by the "One State Under God" plate with its depiction of three crosses on Calvary Hill, or the "One Nation Under God" Knights of Columbus plate. As noted above, there was some evidence in front of the DMVB that people were offended by the Buffalo Soldiers plate, but it was approved shortly after Texas SCV's was denied.[38] There is no objective standard by which to determine if a proposed specialty plate is "offensive." Not even the committees in

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[37] In October 2009, at the initial vote on the Texas SCV plate, three out of five of the members of the TxDOT specialty plate committee apparently determined that Texas SCV's plate was not offensive, and voted to approve the plate. App. 52. In December 2009, TxDOT's same committee voted again and determined by a majority that the plate was offensive. *See* App. 52, USCA5 293. In a vote on April 14, 2011, four members of the DMVB concluded that the Texas SCV plate was not offensive, and four other members disagreed. App. 45, ¶ 17. However, in the vote on November 10, 2011, all eight attending members of DMVB concluded that the plate was offensive. App. 46, ¶ 20; App. 60.

[38] USCA5 377, 451.

charge of enforcing the standard could consistently apply it. The Constitution does not allow the State to censor unpopular viewpoints because a few or even a majority finds them "offensive." Such a standard allows for unbridled discretion and is a recipe for viewpoint discrimination.

It is ironic that the DMVB defends the denial of the Texas SCV license plate application on the ground that the public finds the message offensive, when the State communicates the same message through enacting legislation giving State employees the right to take Confederate Heroes Day off work, through selling Confederate flags and replica Confederate currency in the gift shop, and through maintaining public monuments to the Confederate soldiers and Texas's role in the Confederacy. It is also unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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